STATE OF RHODE ISLAND

KENT, SC. **SUPERIOR COURT**

(FILED: April 24, 2024)

TOLL GATE RADIOLOGY II, LLC, ANTHONY BRUZZESE, KEI DOI and VINCENT FRAZZINI,	:	
Plaintiffs/Counterclaim Defendants,	:	
v.	:	**C.A. No. KC-2020-0368**
ALLIANCE HEALTHCARE SERVICES, INC.,	:	
Defendant/Counterclaim Plaintiff.	:	

DECISION

LICHT, J. Plaintiffs Toll Gate Radiology II, LLC ("Toll Gate"), Anthony Bruzzese, Kei Doi, and Vincent Frazzini (collectively, "Plaintiffs") have brought this action against Defendant Alliance Healthcare Services, Inc. ("Alliance Healthcare") seeking money damages for breach of contract claims. Pursuant to Rule 56 of the Superior Court Rules of Civil Procedure, Alliance Healthcare moves for summary judgment as to all counts alleged against it in Plaintiffs' Amended Verified Complaint. Plaintiffs object to Alliance Healthcare's motion. For the reasons stated herein, Alliance Healthcare's Motion for Summary Judgment is denied.

I

Facts and Travel

Toll Gate is a for-profit radiology practice located in Warwick, Rhode Island. *See* Amended Verified Complaint (Am. Compl.), ¶ 1. Toll Gate offers its services for general practices, medical and surgical subspecialties, hospitals, primary care, and urgent care facilities.

See id. ¶ 11. Toll Gate provides full-service diagnostic digital imaging services, therapeutic chronic and acute pain control services, and computed tomography ("CT") guided biopsy procedures to diagnose cancer. *See id*. ¶ 10. Alliance Healthcare provides mobile radiology services, fixed site practice management, and administrative services. *See id*. ¶ 14; *see also* Mem. in Supp. of Def.'s Mot. for Summ. J. (Def.'s Mem.) Ex. 2 (Aff. of Gina M. Bonica, Esq., ¶ 3). Specifically, these administrative services include marketing, coding, billing and collecting, scheduling, and patient preauthorization. *See* Am. Compl. ¶ 14.

In 2018, Alliance Healthcare was interested in purchasing a facility in Rhode Island to obtain control and operation of a clinical license. *See* Def.'s Mem. Ex. 3 (Mercurio Dep.), at 98:14-19, Nov. 20, 2023. Gregory Mercurio ("Mercurio"), a business consultant for Alliance Healthcare and Toll Gate,[1] arranged an introduction between the two entities, with the objective of Alliance Healthcare acquiring Toll Gate. *See id*. at 98:20-24. A meeting was scheduled between Dr. Vincent Frazzini ("Dr. Frazzini"), the Managing Partner of Toll Gate, and various members of Alliance Healthcare at its main administrative office. *See* Pl.'s Mem. in Supp. of its Obj. to Mot. for Summ. J. (Pl.'s Obj.) Ex. B (Frazzini Dep.), at 62:6-13, Nov. 16, 2023. During the meeting, it was conveyed by Alliance Healthcare representatives that they wanted a phased approach to acquire Toll Gate, starting with assuming full operational responsibilities to gain insight into its operations prior to the acquisition. *See id*. at 62:13-18, 84:14-19. Following this meeting, Alliance Healthcare began performing a due diligence review of Toll Gate's practice. *See* Mercurio Dep. at 98:3-13. Thereafter, Toll Gate and Alliance Healthcare entered into a Magnetic Resonance

[1] At this time, Gregory Mercurio ("Mercurio") was also Toll Gate's interim Chief Executive Officer. *See* Mem. in Supp. of Def.'s Mot. for Summ. J. (Def.'s Mem.) Ex. 3 (Mercurio Dep.), at 20:1-21:1, Nov. 20, 2023.

Imaging Master Services Agreement (referred to herein as "MRI MSA") and a Master Services Agreement (referred to herein as "MSA").

A

The MRI MSA

By way of background, Toll Gate had previously entered into a block lease agreement to rent space and time for an MRI machine owned by West Bay Orthopedics and Neurosurgery (referred to herein as "WBON"). *See* Frazzini Dep. at 74:9-13. Through its developing relationship with Alliance Healthcare, Toll Gate believed that it was overpaying for the block lease agreement. *See* Mercurio Dep. at 132:8-16. As a result, Toll Gate initiated negotiations with WBON to reduce the cost of the block lease which resulted in the termination of the agreement. *See id*. at 132:17-133:4.

Subsequently, Toll Gate and Alliance Healthcare executed the MRI MSA on January 17, 2019, which was drafted by Alliance Healthcare. *See* Def.'s Mem. Ex. 4 (the "MRI MSA"), at 1. The purpose of the MRI MSA was for Alliance Healthcare to provide Toll Gate with a mobile MRI machine to be stationed and utilized at 300 Toll Gate Road, Warwick, Rhode Island. *See id*. § 2. In accordance with the MRI MSA, Toll Gate agreed to pay Alliance Healthcare a monthly fee of $30,000. *See id*. § 3. Section 5 of the MRI MSA delineates the commencement date and states, in relevant part, as follows:

> "TERM. The initial term of this Agreement shall be for twelve (12) months commencing upon delivery of the Unit to Client (the "Commencement Date") anticipated to be on or about February 1, 2019, pending Department of Health approval. Fees under this Agreement shall begin to accrue on the Commencement Date. This Agreement shall not automatically renew." *Id*. § 5.

However, the Department of Health never provided approval, and consequently, the mobile MRI machine was never delivered.

B

The MSA

Toll Gate and Alliance Healthcare executed the MSA on June 12, 2019. *See* Def.'s Mem. Ex. 5 (the "MSA"). Pursuant to the MSA, Alliance Healthcare would provide Toll Gate with the following services: (1) scheduling, (2) IT services, (3) prior authorization, (4) "bill and collect," and (5) marketing. *See id*. §§ 1, 2, 5, 8, 9. In return, the MSA required Toll Gate to pay Alliance Healthcare $14,583 per month for scheduling services. *See id*. § 6. Toll Gate was also responsible for any IT Intergy/ERad System costs required for the operation of services. *See id*. § 5. Specifically, Toll Gate was responsible for paying Alliance Healthcare $2.50 per study for the images and functionality in the Alliance Healthcare ERad PACS system. *See id*. Furthermore, Toll Gate agreed to compensate Alliance Healthcare 5 percent of the net collections to include claims submission, ICD-10 diagnosis coding, cash accounting, accounts receivable recovery, and financial reporting. *See id*. § 8(a). Lastly, Toll Gate agreed to pay Alliance Healthcare $6,455 per month for a part-time marketing Account Executive. *See id*. § 9. The Alliance Healthcare Account Executive was required to work three days per week marketing Toll Gate's services. *See id*.

The MSA also outlined the remedies available to each party in the event of a breach. Accordingly, Section 2 of the MSA, entitled Prior Authorization, states in relevant part:

> "[Toll Gate] agrees that no such insurance prior authorization shall be considered a guarantee of any reimbursement to [Toll Gate] of any US, XR, DXA, MAMMO, MR, AND CT procedure, and [Toll Gate] shall be solely responsible for whether or not it receives reimbursement of US, XR, DXA, MAMMO, MR, AND CT procedures, and [Toll Gate] shall hold [Alliance Healthcare] harmless from and against any claims, actions, or damages arising from [Toll Gate's] receipt or lack thereof of reimbursement of US, XR, DXA, MAMMO, MR, AND CT procedures." *Id*. § 2.

Even more broadly, Section 11.2 of the MSA, entitled Remedies, states:

> "Neither party shall be responsible for failure to provide services as a result of conditions caused by the other party. NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, NEITHER PARTY SHALL BE RESPONSIBLE FOR INDIRECT, INCIDENTAL, PUNITIVE, CONSEQUENTIAL, OR OTHER SPECIAL DAMAGES THAT THE OTHER PARTY MAY INCUR OR EXPERIENCE IN CONNECTION WITH THIS AGREEMENT OR THE SERVICES PROVIDED BY A PARTY, HOWEVER CAUSED AND UNDER WHATEVER THEORY OF LIABILITY, EVEN IF A PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES." *Id.* § 11.2

In January 2020, Alliance Healthcare asserted and confronted Toll Gate, claiming that Toll Gate owed over $100,000 for services rendered prior to December 31, 2019. *See* Aff. of Gina M. Bonica, Esq., ¶ 7. On February 18, 2020, Dr. Frazzini and Gina M. Bonica ("Bonica"), Deputy General Counsel and Chief Compliance Officer of Alliance Healthcare, met in an attempt to resolve the alleged outstanding debt for services provided by Alliance Healthcare. *See id.* ¶ 8. During that meeting, Dr. Frazzini offered to sell Alliance Healthcare the Certificate of Need (referred to herein as the "CON") authority to a CT unit in exchange for releasing the purported outstanding debt. *See id.* ¶ 10. The offer was not accepted.

On February 24, 2020, Alliance Healthcare sent Toll Gate a letter informing Toll Gate that services would be suspended if it did not pay the outstanding debt or agree to a written repayment plan. *See id.* ¶ 11. In response to the February 24, 2020 letter, Dr. Frazzini directed Bonica to draft a Bill of Sale for the CON authority. *See id.* ¶ 12. However, the Bill of Sale was never executed, and Toll Gate refused to pay Alliance Healthcare. *See id.* ¶ 17. Given the sequence of events, Alliance Healthcare informed Toll Gate that it would be suspending services on April 17, 2020. *See id.* ¶ 20.

On April 23, 2020, Toll Gate filed a Verified Complaint against Alliance Healthcare asserting the following causes of action: Breach of Contract - Lost Revenue for Alliance

Healthcare's Failure to Perform Under the MRI MSA (Count I); Breach of Contract - Lost Revenue for Alliance Healthcare's Failure to Collect Co-Payments, Deductibles and Past Due Balances from August through December 2019 (Count II); Breach of Contract - Lost Revenues for Under-Coding Procedures (Count III); Breach of Contract - Facts Related to Marketing Services Charges (Count IV); Failure to Provide Necessary IT Services (Count V); Violation of Executive Order 20-21 (Count VI); (Count VII);[2] Injunctive Relief (Count VIII); and Alternative Relief - Petition for COVID-19 Receivership (Count IX).[3] *See* Verified Complaint (Compl.). Subsequently, on May 1, 2020, Toll Gate filed an Amended Verified Complaint to add the following count: Alternative Relief - Petition for Receivership (Count X). *See* Am. Compl.

After filing its Amended Verified Complaint, Toll Gate sought a temporary restraining order against Alliance Healthcare. *See* Temporary Restraining Order. This Court granted Toll Gate's temporary restraining order, prohibiting Alliance Healthcare from suspending services and from terminating the MSA up to and including June 24, 2020. *See id.* Moreover, this Court imposed the condition that Toll Gate would pay Alliance Healthcare through the duration of the preliminary injunction. *See id.* Toll Gate complied with the payment condition and the parties worked together to transfer Toll Gate's billing and other administrative functions to another service provider. *See id.*

On June 2, 2020, Alliance Healthcare filed its Counterclaim against Toll Gate asserting the following causes of action: Breach of Contract (Count I); Breach of the Implied Duty of Good Faith and Fair Dealing (Count II); Unjust Enrichment (Count III); and Fraudulent

[2] There is no Count VII in either the Verified Complaint or Amended Verified Complaint. Therefore, in total there are only nine substantive counts.

[3] While not materially significant, it is worth noting that in the Verified Complaint, this claim is designated as Count VII; however, the accurate roman numeral is IX.

Misrepresentation (Count IV). *See* Counterclaim (Countercl.). Alliance Healthcare now moves for summary judgment on all remaining counts of the Amended Verified Complaint. *See* Def.'s Mem. at 1. Oral argument occurred on March 8, 2024.

II

Standard of Review

"Summary judgment is a drastic remedy, and a motion for summary judgment should be dealt with cautiously." *Cruz v. DaimlerChrysler Motors Corp.*, 66 A.3d 446, 451 (R.I. 2013) (internal quotation omitted). "[S]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the Court determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Quest Diagnostics, LLC v. Pinnacle Consortium of Higher Education*, 93 A.3d 949, 951 (R.I. 2014) (internal quotations omitted); *see* Super. R. Civ. P. 56. The moving party "bears the initial burden of establishing the absence of a genuine issue of fact." *McGovern v. Bank of America, N.A.*, 91 A.3d 853, 858 (R.I. 2014) (citation omitted). Then the burden shifts and, as reiterated by the Rhode Island Supreme Court:

> "The party opposing summary judgment bears the burden of proving, by competent evidence, the existence of facts in dispute. The opposing party will not be allowed to rely upon mere allegations or denials in the pleadings but rather, by affidavits or otherwise the opposing party has an affirmative duty to set forth specific facts showing that there is a genuine issue of material fact." *Henry v. Media General Operations, Inc.*, 254 A.3d 822, 834 (R.I. 2021) (cleaned up, citations omitted).

In deciding a motion for summary judgment, the Court "views the evidence in the light most favorable to the nonmoving party[,]" *Mruk v. Mortgage Electronic Registration Systems, Inc.*, 82 A.3d 527, 532 (R.I. 2013), and "does not pass upon the weight or the credibility of the evidence[.]" *Palmisciano v. Burrillville Racing Association*, 603 A.2d 317, 320 (R.I. 1992).

III

Analysis

At the outset, it is imperative to highlight that given the passage of time, the end of the COVID-19 Pandemic, and the subsequent termination of the parties' relationship, Toll Gate and Alliance Healthcare submit that Counts VI, VII,[4] VIII, IX, and X are now moot and should be dismissed. *See* Def.'s Mem. at 2; *see also* Pl.'s Obj. at 1. Therefore, the only counts under consideration are limited to the following: Breach of Contract - Lost Revenue for Alliance Healthcare's Failure to Perform Under the MRI MSA (Count I); Breach of Contract - Lost Revenue for Alliance Healthcare's Failure to Collect Co-Payments, Deductibles and Past Due Balances from August through December 2019 (Count II); Breach of Contract - Lost Revenues for Under-Coding Procedures (Count III); Breach of Contract - Facts Related to Marketing Services Charges (Count IV); and Failure to Provide Necessary IT Services (Count V).

A

Breach of Contract Claims

To succeed on a breach of contract claim under Rhode Island law, a plaintiff must prove that (1) an agreement existed between the parties; (2) the defendant breached the agreement; and (3) the breach caused the plaintiff to suffer damages. *See Petrarca v. Fidelity & Casualty Insurance Co.*, 884 A.2d 406, 410 (R.I. 2005). The question of whether a contract exists is a question of law. *See Fogarty v. Palumbo*, 163 A.3d 526, 539 (R.I. 2017). In this case, there is no contention regarding the existence of a contract. Both parties acknowledge that they willingly entered into the MRI MSA and the MSA on January 17, 2019 and June 12, 2019, respectively.

[4] As stated above, there is no Count VII in either the Verified Complaint or Amended Verified Complaint.

Whether Alliance Healthcare materially breached the MRI MSA and MSA remains an issue of fact; one that this Court cannot summarily decide. The Rhode Island Supreme Court has articulated that "whether a party has substantially performed or materially breached its contractual obligations is usually a question of fact to be decided by the jury." *Women's Development Corp. v. City of Central Falls*, 764 A.2d 151, 158 (R.I. 2001).

1

MRI MSA

Alliance Healthcare contends that it cannot be held liable for a breach of the MRI MSA as the term of the contract never began because the Department of Health never approved the MRI MSA. *See* Def.'s Mem. at 4, 15. Conversely, Toll Gate submits that Alliance Healthcare breached the terms of the MRI MSA by neglecting to comply with an existing government or regulatory agency obligation—namely, the necessity for Alliance Healthcare to possess a Certificate of Need. *See* Pl.'s Obj. at 6.

The Rhode Island Supreme Court "adhere[s] to the rule of interpretation that when considering 'whether a contract is clear and unambiguous, the document must be viewed in its entirety and its language be given its plain, ordinary and usual meaning.'" *Garden City Treatment Center, Inc. v. Coordinated Health Partners, Inc.*, 852 A.2d 535, 541 (R.I. 2004) (internal quotation omitted). The MRI MSA specifies that the commencement date hinges on approval from the Department of Health. While Alliance Healthcare contends "that the Parties never received approval," and thus bears no responsibility, Mercurio testified that the Department of Health never granted approval because Alliance Healthcare failed to provide Toll Gate with the Certificate of Need that they claimed to possess prior to entering the MRI MSA. *See* Def.'s Mem. at 15; *see also* Mercurio Dep. at 115:23-116:1. As such, Toll Gate was unable to perform any

MRI services for a period and had to renegotiate a new lease, "but ultimately at [an] even higher cost than [it] had previously had with WBON." *See* Pl.'s Obj. Ex. D (Pls.' Second Suppl. Answers to Interrog.), at 31.

However, the MRI MSA does not definitively assign responsibility to either party for obtaining Department of Health approval. Determining whether Toll Gate or Alliance Healthcare held the obligation to secure approval is a factual inquiry. Thus, there is a genuine issue of material fact relating to whether Alliance Healthcare failed to obtain Department of Health approval, and therefore, breached its obligations to Toll Gate as a result. Therefore, viewing the evidence in the light most favorable to Toll Gate, this Court **denies** Alliance Healthcare's Motion for Summary Judgment as to Count I.

2

MSA

i

Count II

Lost Revenue for Alliance Healthcare's Failure to Collect Co-Payments, Deductibles, and Past Due Balances from August through December 2019

Alliance Healthcare contends that once the MSA was executed, it collected the co-pays and deductibles that were billed to patients. *See* Def.'s Mem. at 16. To substantiate its argument, Alliance Healthcare points to Dr. Frazzini's deposition. *See generally* Frazzini Dep. When asked, "[s]o some of the co-payments were then billed to patients; correct?," Dr. Frazzini responded with, "[a]s far as I understand." *Id*. at 86:23-25. Even further, Alliance Healthcare references a segment of Mercurio's deposition in which he affirmed that Alliance Healthcare billed the patients for co-pays. *See* Mercurio Dep. at 89:22-25. However, these fragmented snippets of testimony do not paint the full picture; thus, this Court remains unconvinced.

Throughout Mercurio's deposition, he emphasized that if Alliance did not collect co-pays upfront in cash, it was supposed to bill patients for the co-pays retrospectively, which was not followed. *See id*. at 89:2-9. Specifically, Mercurio testified that "Alliance [Healthcare] was supposed to bill these patients the co-pays as if the patient came in without a checkbook or without a credit card, and [Toll Gate] found out they did not collect the cash, nor did they bill the patients." *Id*. at 89:18-21. Mercurio also testified that Toll Gate noticed a discrepancy between what was billed and what was collected, suspecting that Alliance Healthcare was not collecting the co-pays. *See id*. at 144:25-145:8. This discrepancy led to Toll Gate initiating an internal investigation; subsequently, Alliance Healthcare admitted to not collecting patients' co-pays, but asserted that it would immediately start thereafter. *See id*. Mercurio explained that in an attempt to rectify the issue, Alliance Healthcare began to bill patients for co-pays after the ninety-day period permitted by insurance policies for retroactive billing, which led to a loss of revenue. *See id*. at 89:22-90:4.

Based on the deposition testimony and exhibits presented, this Court believes that there is a genuine issue of material fact as to whether Alliance Healthcare substantially performed, particularly, whether or not Alliance Healthcare billed appropriately pursuant to the MSA. *See Women's Development Corp*., 764 A.2d at 158. Therefore, viewing the evidence in the light most favorable to Toll Gate, this Court **denies** Alliance Healthcare's Motion for Summary Judgment as to Count II.

ii

Count III

Lost Revenue for Under-Coding Procedures

In relation to Count III, Toll Gate's allegations center on Alliance Healthcare's underbilling or failure to bill for the Doppler component of an ultrasound, a significant source of Toll Gate's

revenue. *See* Pl.'s Obj. at 13. Specifically, Toll Gate asserts that Alliance Healthcare lacked the authority to make the decision not to bill for the Doppler component, without consultation with or disclosure to Toll Gate. *See id.* However, Alliance Healthcare argues that there is nothing in the MSA which outlined how it was supposed to code procedures; thus, "[Alliance Healthcare] was not obligated under the MSA to code as Toll Gate had previously been coding." Def.'s Mem. at 17.

The Rhode Island Supreme Court has made it clear that "[w]hen ascertaining the usual and ordinary meaning of contractual language, every word of the contract should be given meaning and effect[.]" *Andrukiewicz v. Andrukiewicz*, 860 A.2d 235, 239 (R.I. 2004) (citing *Employers Mutual Casualty Co. v. Pires*, 723 A.2d 295, 298 (R.I. 1999)). Pursuant to the MSA, the billing provision specifies, in pertinent part, that "[a]s of the Effective Date, under [Toll Gate's] tax identification number, [Alliance Healthcare] shall bill and collect for *each* patient under this Agreement." MSA § 8(a) (emphasis added). As correctly pointed out by Alliance Healthcare, the MSA does not explicitly outline specific procedures or patients for billing. However, this does not absolve Alliance Healthcare from liability. The term "each" in the provision suggests to this Court that Alliance Healthcare was obligated to bill and collect from every patient, irrespective of the procedure or service rendered.

Alliance Healthcare maintains that the absence of specific coding instructions in the MSA resulted in either non-coding or under-coding of certain procedures. *See* Def.'s Mem. at 17. On the other hand, Toll Gate insists that Alliance Healthcare had a continuing obligation to "bill and collect for each patient," and Alliance Healthcare's failure to do so led to lost revenue. *See* Mercurio Dep. at 90:24-25. Therefore, viewing the evidence in the light most favorable to Toll Gate, this Court **denies** Alliance Healthcare's Motion for Summary Judgment as to Count III

because a genuine issue of material fact exists as to whether Alliance Healthcare substantially performed or materially breached its contractual obligations pursuant to the MSA. *See Women's Development Corp*., 764 A.2d at 158.

iii

Count IV

Marketing Services Charges

In accordance with the MSA terms, marketing services were to be conducted through Alliance Healthcare's customer portal, wherein Alliance Healthcare agreed to extend Toll Gate access to marketing, support features, and educational resources tailored to physicians. *See* MSA § 9(a). Alliance Healthcare was obligated to actively promote these services directly to physicians in the specified service region and undertake other marketing endeavors as deemed appropriate. *See id*. As part of this agreement, Toll Gate agreed to compensate Alliance Healthcare $6,455 per month for the services of a part-time marketing Account Executive. *See id*.

Alliance Healthcare concedes that it failed to provide the marketing services it agreed to under the MSA. *See* Def.'s Mem. at 17. However, Alliance Healthcare argues that due to its failure to deliver such services, it refrained from invoicing Toll Gate. *See* Mercurio Dep. at 82:2-8 ("Q: Are you aware, as you sit here today, if [Alliance Healthcare] ever invoiced Toll Gate for marketing services? A: They originally invoiced Toll Gate for those services, because I was one of the people that opposed that bill, or explained why that bill should not have occurred; and from what I understand, it was credited."). Consequently, it is Alliance Healthcare's position that Toll Gate has not incurred any damages associated with the provision of marketing services outlined in the MSA. *See* Def.'s Mem. at 17. Notwithstanding Alliance Healthcare's position, Toll Gate contends that it did suffer direct harm due to Alliance Healthcare's failure to provide marketing

services, citing a statistically significant decline in referrals from 2019 to 2020. *See* Pls.' Second Suppl. Answers to Interrog., at 23-28. Specifically, Toll Gate maintains that its business and reputation depended on physician referrals. *See id*. at 25. It submits that the decline is the result of "patient complaints to Toll Gate and the Rhode Island Department of Health regarding the scheduling procedures implemented by [Alliance Healthcare], and referring physician's inability to access various reports due to [Alliance Healthcare's] failure to perform due diligence to integrate its systems with Toll Gate." *See id*. at 25-26.

Nevertheless, even if Toll Gate did not suffer this damage, Alliance Healthcare's "argument founders in the face of the well-settled principle of Rhode Island law that nominal damages may be awarded for breach of contract, even if no actual damage or loss can be proven." *A.J. Amer Agency, Inc. v. Astonish Results, LLC*, No. 12-351 S, 2014 WL 3496964, at *34 (D.R.I. July 11, 2014). As a well-respected treatise emphasizes, "[a]n unexcused failure to perform a contract is a legal wrong. An action will therefore lie for the breach although it causes no injury. Nominal damages may then be awarded." 4 *Williston on Contracts* § 64:6 (4th ed. 2014); *see also* 11 *Corbin on Contracts* § 55.10 (Rev. ed. 2013) ("[F]or every breach of contract, a cause of action exists . . . If the aggrieved party has suffered no compensable damages, a judgment for nominal damages will be entered.").

Alliance Healthcare retained the responsibility to ensure the ongoing engagement of referring physicians to Toll Gate, including educating them on the use of Alliance Healthcare's systems to maintain collaboration with Toll Gate, as well as expanding the network of referring physicians to drive business growth. Despite the absence of invoices for marketing services, Alliance Healthcare remained legally bound by these contractual obligations. Therefore, viewing

the evidence in the light most favorable to Toll Gate, this Court **denies** Alliance Healthcare's Motion for Summary Judgment as to Count IV.

iv

Count V

Failure to Provide Necessary IT Services

Alliance Healthcare asserts that, although the parties dispute the commencement date, it provided Toll Gate with the requisite IT services and adhered to the terms of the MSA. *See* Def.'s Mem. at 18. Specifically, Alliance Healthcare asserts that it created an interface between Toll Gate's Electronic Medical Record (referred to herein as "EMR") retention services and Alliance Healthcare's EMR retention services so that patient images could be uploaded and accessible. *See* Aff. of Gina M. Bonica Esq., ¶ 6.

Pursuant to the MSA, the IT services provision states:

> "[Alliance Healthcare] shall be responsible for the IT Intergy/ERad System costs required for operation of services under this Agreement. Client shall pay Alliance $2.50 per study for the images and functionality in the Alliance ERad PACS system. PACS system and storage includes image data backup with high availability, diagnostic viewer software functionality, web based viewing access, and all services offered with [Alliance Healthcare's] vendor support agreement." MSA § 5.

On August 5, 2019, Dr. Anthony Bruzzese ("Dr. Bruzzese") informed Tim Hays ("Hays"), Alliance Healthcare's Senior Manager of Radiology Informatics, that although he had access to the ERad PACS, he could not dictate, and that several doctors experienced delays in their work due to IT issues resulting in backlog. *See* Pl.'s Obj. Ex. G (Aug. 5, 2019 E-mail Exchange). Furthermore, Alliance Healthcare did not install the necessary speech microphones to be compatible with Alliance Healthcare's ERad viewer. *See* Pl.'s Obj. Ex. H (Aug. 5, 2019 E-mail Exchange).

Hays, several weeks after the commencement date of August 1, 2019, acknowledged that Toll Gate's physicians were complaining about Alliance Healthcare's IT services, including that (1) Alliance Healthcare had not implemented the electronic system for delivering results to referring physician's offices and (2) that some referring physicians did not have access to the ERad PACS system. *See* Pl.'s Obj. Ex. J. (Hays Dep.), at 112:3-14, Sept. 11, 2023. Dr. Frazzini also highlighted the following IT issues on September 10, 2019: "(1.) Lifepoint integration; (2.) Access to prior exams for [ERad] from our [Toll Gate] archive server; (3.) Scanner install at Cumberland, WBO; (4.) Workaround/solution for slowness of scanning paperwork into [ERad]; (5.) Report printing font and spacing; (6.) [A]dding a [cc'd] doc to report or making sure that a [cc'd] report gets to the right doc; (7.) Are all auto and manual faxed reports now getting to the referring physicians? [Are] the 'in house' [Toll Gate] EHR integrated reports sending properly?" *See* Aug. 5, 2019 E-mail Exchange; *see also* Pl.'s Obj. Ex. I (Sept. 10-11, 2019 E-mail Exchange).

Untangling the factual intricacies of this claim falls within the purview of a factfinder who must determine whether Alliance Healthcare's performance amounted to a breach. Therefore, viewing the evidence in the light most favorable to Toll Gate, this Court **denies** Alliance Healthcare's Motion for Summary Judgment as to Count V because a genuine issue of material fact exists as to whether Alliance Healthcare breached its contractual obligations pursuant to the MSA. *See Women's Development Corp*., 764 A.2d at 158.

B

Damages

In addition to the aforementioned arguments, Alliance Healthcare maintains that its entitlement to summary judgment on all remaining counts is two-fold. First, Alliance Healthcare argues that Toll Gate cannot establish its alleged damages with reasonable certainty. *See* Def.'s

Mem. at 13. In particular, Alliance Healthcare submits that, despite Toll Gate assembling "some rudimentary damage calculations," the methodology remains unclear, as no expert has been introduced to testify regarding the values of lost revenue. *See id*. at 14. Second, Alliance Healthcare asserts that even if Toll Gate can establish its alleged damages with reasonable certainty, Toll Gate cannot recover lost revenue because the MSA explicitly prevents it from recovering consequential damages. *See id*. at 11.

The basic precondition for the recovery of lost revenue is that such a loss be established "'with reasonable certainty.'" *See Fogarty*, 163 A.3d at 537 (quoting *Troutbrook Farm, Inc. v. DeWitt*, 611 A.2d 820, 824 (R.I. 1992)). "Although mathematical precision is not required, the jury should be provided with some rational model of how the lost [revenue] occurred and on what basis they have been computed." *Id.* (citing *Abbey Medical/Abbey Rents, Inc. v. Mignacca*, 471 A.2d 189, 195 (R.I. 1984)). However, "[a]s with other rules of reasonableness, the degree to which such proof will succeed in establishing the reasonable certainty of [revenue] must depend in a large measure upon the circumstances of the particular case and thus will escape the hard and fast rules of general applicability." *Smith Development Corp. v. Bilow Enterprises, Inc*., 112 R.I. 203, 212, 308 A.2d 477, 482 (1973).

This Court acknowledges that to make a viable claim for breach of contract, Toll Gate, as the party alleging the breach, bears the burden of proving the amount of damages it has suffered with a reasonable degree of certainty. *See Wai Feng Trading Co., Ltd. v. Quick Fitting, Inc*., No. 13-033WES, 2018 WL 6605927, at *23 (D.R.I. Dec. 17, 2018), *report and recommendation adopted sub nom. Wai Feng Trading Co., Ltd. v. Quick Fitting Inc*., No. 13-033 WES, 2019 WL 6827448 (D.R.I. Sept. 16, 2019). This Court believes Toll Gate has sufficiently done so to survive a motion for summary judgment.

In this case, Toll Gate has not relied solely on bare allegations; rather, it has provided reasonably precise figures to substantiate its damages. During Dr. Frazzini's deposition, he testified that the charts and graphs submitted were prepared collaboratively by Toll Gate's staff, under the advisement and guidance of Toll Gate's practice manager, Fonnie Soderstrom. *See* Frazzini Dep. at 150:20-25. Mercurio's deposition testimony also substantiates this proposition. When asked, "[s]o what is the amount of Toll Gate's damages claim in this case against Alliance [Healthcare]?," Mercurio responded, "[t]he damages that have been able to be quantified are north of $1.8 million." *See* Mercurio Dep. at 91:10-14. When questioned about the calculation, he explained that Toll Gate's accountant prepared an internal document, comparing the lost revenue to Toll Gate's average daily revenue over a specific period, encompassing the six months leading up to Alliance Healthcare taking over Toll Gate's billing, coding, and collection services. *See id*. at 91:15-23.

Furthermore, Toll Gate highlighted that "the payments received by Toll Gate dropped significantly starting in April of 2019 – when one would expect payments from MRIs that were not able to be conducted due to [Alliance Healthcare's] breach of contract would be received – and maintained at that decreased rate, until August of 2019, when the payments dropped even more precipitously as a result of [Alliance Healthcare's] multiple failures regarding coding, scheduling, and charging for services provided began." Pls.' Second Suppl. Answers to Interrog., at 23. "Accordingly, the decrease in revenue between April of 2019 and April of 2022 equals arising out of [Alliance Healthcare's] breaches of its obligations to Toll Gate totals, $5,845,085. Even if one were to take out the decreases in revenue from May 2020 (when one would expect to see the effects of the State of Rhode Island's Covid-19 orders have an impact on revenue) to September of 2020

(when the effect of the Covid-19 orders would end) entirely, the loss in revenue from April 2019 up to April 2022 was of $4,673,544." *See id*. at 24-25.

In addition to the deposition testimony and exhibits, Toll Gate disclosed an expert report which opines as to its lost revenue.[5] The expert assessed the lost revenue stemming "from the loss of use of the mobile MRI (around February 1, 2019) and the change of billing collection company (around August 1, 2019)." Pl.'s Sur-Reply Mem. in Supp. of its Obj. to Mot. for Summ. J. (Pl.'s Sur-Reply) Ex. K (Labella's Expert Report). The expert's assessment revealed a significant decline in monthly billings, particularly commencing in August of 2019. *See id*. at 2. Overall, there was a 47.10 percent decrease in billings for 2019 compared to those of 2018. *See id*. Furthermore, after examining collected revenue, the expert concluded that Toll Gate experienced a decline exceeding 40 percentage points, dropping to 72.41 percent. *See id*. at 3. The expert prepared an estimate of lost revenue month by month from February 2019 through March 2023 with the following methodology:

> "I have projected billings for February 2019 through January 2020 by applying a 114.79% growth rate to the same month of the prior year. For February and March 2020, I have used 100% of the previous year to project billings. I then reduced the projected billings for the actual billings by month to arrive at lost billings. I then applied the average collection ratio of 2017 and 2018, 44.82% . . ., to arrive at lost collections. I then deducted certain directly variable expenses from lost collected revenue. These expenses are Merchant Credit Card Fees and Billing Service Fees Paid. I used the ratio of the cost to total revenue from 2018 to estimate the savings in these expense accounts . . .
>
> "For the COVID period of April 2020 through March 2021, I estimated monthly billings using 25% to 80% of the prior year's monthly projected billings. This was done to estimate what billings

[5] This Court acknowledges Alliance Healthcare's argument regarding the untimeliness of Toll Gate's expert report. Indeed, the report was submitted after full briefing on Alliance Healthcare's Motion for Summary Judgment. However, it is worth noting that this Court has issued multiple scheduling orders to which the parties have failed to adhere.

> would have been absent the change to billings but factoring in the impact of COVID . . . I then applied the same collection percentage and saved variable expenses in arriving at my estimated lost revenue . . .
>
> "The period of April 2021 through March 2022 projects monthly billings using a 125% growth trend over the same month of the prior year. For April 2022 through March 2023, I projected monthly billings equal to April 2019 through March 2020, assuming [that Toll Gate's] billings would have returned to pre-pandemic levels. Both periods use the same methodology previously employed to arrive at lost revenue." *See id*. at 3-4.

Our Supreme Court has addressed a comparable issue, albeit with a focus on lost profits rather than lost revenue. In *Fogarty,* the Rhode Island Supreme Court held that the plaintiffs presented sufficient evidence on lost profits to survive a motion for summary judgment. *See Fogarty,* 163 A.3d at 537-38. In *Fogarty*, the plaintiffs provided deposition testimony and presented an appraiser both of which indicated that the plaintiffs incurred damages. *See id*. at 535-37. In the plaintiffs' answers to interrogatories and deposition, the plaintiffs emphasized that they suffered damages because the money they invested was not refunded, and they also claimed that they had the potential to turn the project into a $20 or $30 million-dollar operation. *See id*. at 536. The plaintiffs' real estate appraiser conducted a valuation of the property and explained the formula used for computing damages during his deposition. *See id*. However, when questioned about whether he could quantify the damages to a reasonable degree of certainty, the real estate appraiser was unable to provide a definitive answer at that time. *See id*.

The Rhode Island Supreme Court found persuasive that, although the plaintiffs' expert could not quantify the damages with reasonable certainty, he did supply proof of the existence of damages and a formula by which to compute those damages which proved to be sufficient. *See id.* at 537-38. Furthermore, the Court noted that, at the summary judgment stage, the trial justice must view the evidence in the light most favorable to the nonmovant, draw all reasonable

inferences therefrom, and view the record in its entirety. *See id.* The Court also emphasized that "[t]he existence of damages, including their certainty, is a question for the factfinder to decide." *Id.* at 537. Considering the expert's testimony, coupled with the exhibits submitted, the Court found such evidence sufficient to survive a motion for summary judgment. *See id.*

Notwithstanding the preceding discussion, this Court also takes note that "the law of Rhode Island . . . recognizes that nominal damages may be awarded to a party who can prove breach – but not damages – with sufficient certainty." *Wai Feng Trading Co. Ltd.*, 2018 WL 6605927, at *23. "'A person who has violated his contract cannot escape all liability simply because the injured party cannot prove the precise amount of the damages for which the violator is responsible. The actual damages sustained by an injured party in [breach of contract] cases . . . rest upon reasonable inferences to be drawn from the facts, circumstances and data furnished by the evidence."' *Standard Machinery Co. v. Duncan Shaw Corp.*, 208 F.2d 61, 65 (1st Cir. 1953) (quoting *Zuromski v. Lukaszek*, 67 R.I. 66, 20 A.2d 685, 686 (1941)). As such, Toll Gate may be entitled to nominal damages even if it cannot prove actual damages as part of its contract claim. *See Flynn v. AK Peters*, Ltd., 377 F.3d 13, 23 (1st Cir. 2004); *see also* Restatement (Second) *Contracts* § 346 (1981) ("Although a breach of contract by a party against whom it is enforceable always gives rise to a claim for damages, there are instances in which the breach causes no loss . . . There are also instances in which loss is caused but recovery for that loss is precluded because it cannot be proved with reasonable certainty or because of one of the other limitations . . . In all these instances the injured party will nevertheless get judgment for nominal damages, a small sum usually fixed by judicial practice in the jurisdiction in which the action is brought.").

Alliance Healthcare further maintains that even if Toll Gate can establish its alleged damages with reasonable certainty, Toll Gate cannot recover lost revenue because the MSA

explicitly prevents it from recovering consequential damages contending that "[l]ost profits and business generally fall under the category of consequential damages." *See* Def.'s Mem. at 11-12. Therefore, because "all of Toll Gate's alleged damages are consequential," Toll Gate is prohibited from claiming lost revenue. Def.'s Sur-Sur-Reply in Supp. of its Mot. for Summ. J. (Def.'s Sur-Sur-Reply), at 5. On the other hand, Toll Gate asserts that the purpose of the MSA was for Alliance Healthcare to bill and collect for each patient. *See* Pl.'s Obj. at 16. As Alliance Healthcare failed to fulfill their contractual obligations, Toll Gate submits that this directly resulted in a loss of revenue, constituting direct damages rather than consequential damages. *See id*. at 17.

Rhode Island law does not provide much insight on whether lost revenue should be classified as "direct" or "consequential" damages.[6] Compounding this issue, the MRI MSA and MSA are silent and offer no guidance on this matter, leaving this Court with little direction.

"Direct damages or general damages are damages that flow according to common understanding as the natural and probable consequences of the breach, that is, those arising naturally according to the usual course of things, from such breach of contract itself." *Chestnut Hill Development Corp. v. Otis Elevator Co*., 739 F. Supp. 692, 701 (D.Mass. 1990) (internal citation omitted). Whereas consequential damages are such damages "that do not flow directly and immediately from an injurious act but that result indirectly from the act." *Riley v. Stafford*, 896 A.2d 701, 703 (R.I. 2006) (quoting Black's Law Dictionary 416 (8th ed. 2004)).

[6] Both parties cite to a plethora of case law. Alliance Healthcare references the following cases in support of its argument that lost revenue must be categorized as consequential damages: *Inland American Retail Management, LLC v. Cinemaworld of Florida, Inc*., No. PB-08-5051, 2011 WL 121647 (R.I. Super. Jan. 7, 2011), *Cathay, Inc. v. Vindalu, LLC*, No. PC-2005-5324, 2018 WL 3536367 (R.I. Super. July 5, 2018), and *Logan Equipment Corp. v. Simon Aerials, Inc*., 736 F. Supp. 1188 (D.Mass. 1990). While these cases consistently enforce exclusionary clauses limiting consequential damages in commercial transactions, none of these cases have definitively ruled, as a matter of law on a summary judgment motion, that lost revenue must be conclusively categorized as consequential damages.

"Consequential damages are damages that do not arise naturally or ordinarily from a breach of contract, but which arise because of the intervention of special circumstances." *Chestnut Hill Development Corp.*, 739 F. Supp. at 701 (citing *Boylston Housing Corp. v. O'Toole*, 74 N.E.2d 288 (Mass. 1947).

To further distinguish the two classifications: "Direct damages refer to those which the party lost from the contract itself—in other words, the benefit of the bargain—while consequential damages refer to economic harm beyond the immediate scope of the contract. Lost profits, under appropriate circumstances, can be recoverable as a component of either (and both) direct and consequential damages. Thus, for example, if a services contract is breached and the plaintiff anticipated a profit under the contract, those profits would be recoverable as a component of direct, benefit of the bargain damages. If that same breach had the knock-on effect of causing the plaintiff to close its doors, precluding it from performing other work for which it had contracted and from which it expected to make a profit, those lost profits might be recovered as 'consequential' to the breach." *Atlantech Inc. v. American Panel Corp.*, 743 F.3d 287, 293-94 (1st Cir. 2014) (citing *Atlantic City Associates, LLC v. Carter & Burgess Consultants, Inc.*, 453, F. App'x 174, 179-80 (3rd Cir. 2011)).

Although the issue of whether the purported damages should be characterized as consequential or direct is a question of law, there are unresolved factual issues that prevent this Court from properly characterizing the purported damages at this time. *See Lund-Ross Constructors, Inc v. Vecino National Bridge, LLC*, No. 8:19-CV-550, 2023 WL 5607563, at *8 (D. Neb. Aug. 30, 2023); *see also Long Island Lighting Co. v. Transamerica Delaval, Inc*., 646 F. Supp. 1442, 1459 n.30 (S.D.N.Y. 1986) ("We reserve for trial the question of whether the plaintiff's claimed damages should be characterized as direct, incidental, or consequential.").

Therefore, this Court finds that effectively addressing the parties' extensive arguments regarding whether the damages should be classified as direct or consequential will require additional factual development. In other words, the characterization of damages issues are better resolved on a more completed record developed at trial than by this Court on a motion for summary judgment.

IV

Conclusion

For the reasons stated herein, this Court **DENIES** Alliance Healthcare's Motion for Summary Judgment. Counsel shall confer and submit an appropriate order.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Toll Gate Radiology II, LLC, et al. v. Alliance Healthcare Services, Inc.**
CASE NO:	**KC-2020-0368**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**April 24, 2024**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff:	**Christopher M. Reilly, Esq.**
For Defendant:	**Jeffrey S. Brenner, Esq.**